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The Hutcheson Case

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THE SCHOOL OF LAW

A law symposium of two sessions, one in the morning and one in the afternoon, will be held on Friday, June 6. Each session will be devoted to a legal subject of interest to practicing lawyers. In the evening the Law Alumni Association will hold its annual banquet at the Edgewater Club.

In the 1941 summer session, June 16 to July 25, courses will be offered in the following subjects: Criminal Law, Personal Property, Constitutional Law, Damages, Federal Jurisdiction and Procedure, and Equity.

NOTES

THE HUTCHESON CASE

Anheuser-Busch, Inc., a company engaged in manufacturing and selling beer in interstate commerce, had an agreement with the United Brotherhood of Carpenters and Joiners of America and the International Association of Machinists under which all disputes concerning the erection and dismantlement of machinery in the company's plant were to be settled by arbitration. In 1939, the carpenters' union claimed complete jurisdiction over such work and refused to submit its demand to arbitration. To force the employer's acceptance of its demand the carpenters' union called strikes in the employer's plant, on a construction job to enlarge the employer's facilities and on a construction job to erect a new building for the employer's tenant, and conducted a nation-wide boycott of the employer's product by means of circular letters and articles in the official publication of the union. The Anti-Trust Division of the Department of Justice secured indictments against the officers of the carpenters' union on the charge that the union's activities constituted a criminal combination and conspiracy in violation of the Sherman Act.¹ The Supreme Court of the United States affirmed² an order of the United States District Court sustaining defendants' demurrers.³ The majority of the Court, speaking through Mr. Justice Frankfurter, ruled that the area within which peaceful labor activities are immune from prosecution under the Sherman Act can be

1. Sherman Anti-Trust Act (1890) 26 Stat. 209, 15 U. S. C. A. (1927) secs. 1-7.

2. *United States v. Hutcheson* (1941) 61 S. Ct. 463. Mr. Justice Murphy took no part in the disposition of this case.

3. *United States v. Hutcheson* (D. C. E. D. Mo. 1940) 32 F. Supp. 600.

determined only by examining the challenged conduct in the light of the Clayton Act and the Norris-LaGuardia Act, in which Congress has expressed public policy concerning labor activities. So examined, it was held that the union's conduct did not violate the anti-trust laws. Stone, J., concurred on the grounds that the strikes did not and could not "operate to suppress competition in the market of any product" and that peaceful picketing and publication seeking a boycott were an exercise of free speech, guaranteed by the First Amendment of the United States Constitution. Roberts, J., with whom concurred Hughes, C. J., dissented on the ground that the union's conduct constituted a secondary boycott affecting interstate commerce—an activity which had repeatedly been held illegal by the Supreme Court.

BACKGROUND

The application of the anti-trust laws to labor unions has been the subject of continuous debate since the enactment of the Sherman Act. Whether or not Congress intended the Act to apply to the activities of labor unions,⁴ the United States Supreme Court, in the first labor case—the so-called "Danbury Hatters'" case⁵—to come before it under the Act decided that members of a labor union were liable under the Sherman Act for activities carried on by their union if those activities had a restraining effect upon interstate trade or commerce. This decision was accomplished by giving a strict grammatical interpretation to the word "every" in section 1 of the Act. Three years later, the court, in *Stand-*

4. For the viewpoint that Sherman Act was not intended to apply to union activities: Berman, *Labor and the Sherman Act* (1930) 3-54; Boudin, *The Sherman Act and Labor Disputes* (1939) 39 Col. L. Rev. 1283, (1940) 40 Col. L. Rev. 14; Joseph, *The Sherman Act—A Menace to Freedom* (1928) 18 Amer. Labor Leg. Rev. 297, 298-299; Corwin, *The Anti-Trust Acts and the Constitution* (1932) 18 Va. L. Rev. 355, 373-378; Shulman, *Labor and the Anti-Trust Laws* (1940) 34 Ill. L. Rev. 769. For the viewpoint that Sherman Act was intended to apply to union activities: Emery, *Labor Organizations and the Sherman Act* (1912) 70 Journal of Political Economy 599, 605-607; Thornton, *A Treatise on the Sherman Anti-Trust Act* (1913) 25-28, 677-679; Mason, *Organized Labor and the Law* (1925) cc. 7, 8; Miller, *Anti-Trust Labor Problems: Law and Policy* (1940) 7 Law and Contemporary Problems 82; Steffen, *Labor Activities in Restraint of Trade: The Apex Case* (1941) 50 Yale L. J. 787. For the viewpoint that Congress had no specific intent to include or exclude union activities: Landis, *Book Review* (1931) 44 Harv. L. Rev. 875; Frankfurter and Greene, *The Labor Injunction* (1930) 8, n. 36.

5. *Loewe v. Lawlor* (1908) 208 U. S. 274. The local Hatters' Union struck against hat manufacturers, persuaded the national union and the A. F. of L. to urge members to refuse to patronize in any way retail outlets handling the manufacturer's product. It is not entirely clear whether the strike, the boycott, or both brought the conduct under the Sherman Act. See Landis, *The Apex Case* (1941) 26 Cornell L. Q. 191, 196.

ard Oil Co. v. United States,⁶ declared that in industrial cases the word "every" did not mean "every" but meant "some"—i. e., only unreasonable restraints.

The decision in the *Danbury Hatters'* case intensified labor's agitation for legislative relief from the strictures of the Sherman Act as interpreted by the courts. This agitation culminated in the passage of the Clayton Act.⁷ Section 6 of this Act provided that "the labor of a human being is not a commodity or article of commerce" and that nothing in the anti-trust laws should be construed to prohibit the existence of labor organizations or to

forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws.

Section 20 prohibited the issuance of injunctions by federal courts against specified activities arising out of a dispute concerning terms or conditions of employment in any case between "an employer and employees, or between employers and employees or between employees, or between persons employed and persons seeking employment." This section further provided that the described activities should not be held to be a violation of any law of the United States.

Notwithstanding the hopes of labor that its Magna Carta had been written,⁸ the Supreme Court in *Duplex Printing Press Co. v. Deering*⁹ construed the Clayton Act so that labor found itself in a position worse than that which it had occupied before the passage of the Act. By means of strict grammatical interpretation, the majority of the Court nullified the Clayton Act by enunciating the following doctrine: Section 6, as indicated by the words "lawful" and "legitimate," does not permit any activity by labor organizations or their members which was not previously permissible. The first paragraph of section 20 is merely declaratory and "puts into statutory form familiar restrictions of the granting of injunctions". The second paragraph, however, is an *extraordinary restriction* on the equity powers of the courts—and of course the courts must give full effect to the intent of

6. (1911) 221 U. S. 1.

7. Clayton Anti-Trust Act (1914) 38 Stat. 730, 15 U. S. C. A. (1927) sec. 12.

8. Gompers, The Charter of Industrial Freedom—Labor Provisions of the Clayton Anti-Trust Law (1914) 21 Amer. Federationists 957.

9. (1921) 254 U. S. 443.

Congress—which requires, as Congress must have intended, an absolutely literal interpretation of qualifying words. Thus the specified exemptions must arise out of a dispute involving “terms or conditions of unemployment”; this can only mean that there must be an employer-employee relationship. If an employer-employee relationship is established, fellow unionists who are not employees cannot receive immunization from injunction through section 20, because that section contains no mention of “labor organizations”. These co-unionists must be controlled by section 6 (where labor organizations are mentioned), and this section does not alter the Sherman Act. Consequently, a secondary boycott is enjoined. Moreover, it is enjoined at the instance of private parties because section 16 of the Clayton Act permits such actions.¹⁰

Since the *Duplex* decision, labor cases have given rise to the question of what conditions permit the application of anti-trust laws to labor unions. The decisions are not logically reconcilable,¹¹ but there are certain tests which have been applied either in fact or in form in many of the decisions. It has been held generally that the Sherman Act does not apply to a labor combination if the restraint of interstate commerce is indirect, incidental, and remote.¹² On the other hand, if the restraint is direct,

10. See *Paine Lumber Co. v. Neal* (1917) 244 U. S. 459, holding that an injunction could not be secured by private parties against a violation of the Sherman Act. Mr. Justice Roberts in dissenting in the *Hutcheson* case writes: “In 1908 this court held such a secondary boycott, instigated to enforce the demands of a labor union against an employer, was a violation of the Sherman Act and could be restrained at the suit of the employer.” Evidently Mr. Justice Roberts has reference to the restraining effort of a damage suit and not to an equity proceeding.

11. “No rational principle of labor policy—except possibly the policy that labor unions must not be strong—can harmonize the many decisions of the federal courts in labor cases under the anti-trust laws.” Shulman, *Labor and the Anti-Trust Laws* (1940) 34 Ill. L. Rev. 769, 777.

12. *United Mine Workers v. Coronado Coal Co.* (First Coronado case) (1922) 259 U. S. 344; *United Leather Workers v. Herkert & Meisel Trunk Co.* (C. C. A. 8, 1922) 284 Fed. 446; *Levering & Garrigues Co. v. Morrin* (1933) 289 U. S. 103; *Apex Hosiery Co. v. Leader* (1940) 310 U. S. 469. Cf. *N. L. R. B. v. Jones & Laughlin Steel Corporation* (1937) 301 U. S. 1; *N. L. R. B. v. Friedman Harry Marks Clothing Co.* (1937) 301 U. S. 58. It is now accepted that Congress did not in the Sherman Act exhaust its jurisdiction over interstate commerce, but did in the National Labor Relations Act (1935) 49 Stat. 449-457, c. 372, 29 U. S. C. A. (Supp. 1940) secs. 151-166. Cases arising under the Sherman Act deal with the applicability of the Act, whereas cases under the National Labor Relations Act deal with the extent of constitutional power. See *Brown, The Apex Case and Its Effect Upon Labor Activities and the Anti-Trust Laws* (1941) 21 Boston U. L. Rev. 48, 90; *Gregory, The Sherman Act v. Labor* (1941) 8 U. of Chi. L. Rev. 222, 233; 2 Teller, *Labor Disputes and Collective Bargaining* (1940) 1252, sec. 417.

substantial, and material, the Act has been held to apply.¹³ But when is a restraint direct or indirect? Condemned labor restraints may be classified as arising out of one or more of three types of situations.¹⁴

(1) If the activities of a union have been at the point of production of goods destined for interstate commerce, the courts have found a violation of the anti-trust laws when these activities were carried on with an *intent to restrain interstate commerce*.¹⁵ Evidence of this intent has been found in statements made by union leaders¹⁶ or appearing in union publications.¹⁷ It has been deduced from the fact that the union's attempt to organize a wide area necessarily results in restraint of interstate commerce.¹⁸ Although the Supreme Court has specifically stated that the mere fact of reduction in the amount of goods entering interstate commerce is not sufficient to invoke the Sherman Act,¹⁹ it has allowed evidence of such reduction to show intent.²⁰ For the most part, the test of "intent" is subjective, and the process of its application has led to utter confusion among the courts.²¹

(2) If the activities of a union have interfered with actual transportation²² or with instruments of transportation,²³ lower

13. *Loewe v. Lawlor* (1908) 208 U. S. 274; *Coronado Coal Co. v. United Mine Workers of America* (Second Coronado case) (1925) 268 U. S. 295; *Duplex Printing Co. v. Deering* (1921) 254 U. S. 443; *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n* (1927) 274 U. S. 37; *United States v. Brims* (1926) 272 U. S. 549; *International Brotherhood of Teamsters v. United States* (1934) 291 U. S. 293.

14. Berman, *Labor and the Sherman Act* (1930) 183.

15. "Intent to restrain commerce" must not be confused with the motive of the union. The courts have not been concerned whether the motive or objective of the union was in furtherance of its own interests, or whether the end sought was socially and economically good or bad. *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n* (1927) 274 U. S. 37; *Boyle v. United States* (C. C. A. 7, 1919) 259 Fed. 803.

16. *Coronado Coal Co. v. United Mine Workers* (1925) 268 U. S. 295; *Alco-Zander Co. v. Amalgamated Clothing Workers* (D. C. E. D. Pa. 1929) 35 F. (2d) 203.

17. *Alco-Zander Co. v. Amalgamated Clothing Workers* (D. C. E. D. Pa. 1929) 35 F. (2d) 203; *United States v. Anderson* (C. C. A. 7, 1939) 101 F. (2d) 325.

18. *Borderland Coal Corp. v. United Mine Workers* (D. C. D. Ind. 1921) 275 Fed. 871; *United Mine Workers v. Red Jacket Consol. Coal & Coke Co.* (C. C. A. 4, 1927) 18 F. (2d) 839; *Pittsburgh Term. Coal Co. v. United Mine Workers* (D. C. W. D. Pa. 1927) 22 F. (2d) 559.

19. *United Mine Workers v. Coronado Coal Co.* (1922) 259 U. S. 344; *Apex Hosiery Co. v. Leader* (1940) 310 U. S. 469.

20. *Coronado Coal Co. v. United Mine Workers* (1925) 268 U. S. 295.

21. For discussions of the "intent" test see: Brown, *The Apex Case and Its Effect Upon Labor Activities and the Anti-Trust Laws* (1941) 21 Boston U. L. Rev. 48, 52-80; Berman, *Labor and the Sherman Act* (1930) 235; Comment (1941) 35 Ill. L. Rev. 424.

22. The following cases arose out of the Pullman strike: *United States*

federal courts have invoked the Sherman Act on the slightest pretext.²⁴ The Supreme Court has not ruled on any case falling directly within this classification,²⁵ but it has enunciated the doctrine that the Sherman Act was not enacted to police interstate transportation.²⁶ Lower federal courts, however, have given great weight to acts of violence in determining the existence of a conspiracy to restrain interstate shipment of goods.²⁷

(3) If there has been an interference with the goods at the point of destination or consumption, the courts have generally found a violation of the anti-trust laws. Here, as in cases of interference with production, the "intent" test has been applied; but the existence of a "secondary boycott"²⁸ or "sympathetic

v. Elliot (C. C. E. D. Mo. 1894) 64 Fed. 27; Thomas v. Cincinnati N. O. & T. P. Ry. (C. C. S. D. Ohio 1894) 62 Fed. 803; United States v. Agler (C. C. D. Ind. 1894) 62 Fed. 824; United States v. Cassidy (D. C. N. D. Cal. 1895) 67 Fed. 698; United States v. Debs (C. C. N. D. Ill. 1894) 64 Fed. 724. United States v. Workingmen's Amalgam. Council (C. C. E. D. La. 1893) 54 Fed. 994 (sympathetic strike by draymen); United States v. Railway Employees' Dept. (D. C. N. D. Ill. 1922) 283 Fed. 479 (strike arising out of grievance over working conditions); O'Brien v. United States (C. C. A. 6, 1923) 290 Fed. 185 (truck driver transporting single billet of steel forced by pickets to return billet to shipping plant); United States v. Harvel (D. C. W. D. La. 1923), *Federal Antitrust Laws* (1938) 195 (strikers assaulted roadmaster); Buyer v. Guilan (C. C. A. 2, 1921) 271 Fed. 65 (refusal of dock workers to handle goods transported to docks by non-union truckmen).

23. Williams v. United States (C. C. A. 5, 1923) 295 Fed. 302 (quicksilver put in boiler of engine); Vandell v. United States (C. C. A. 2, 1925) 6 F. (2d) 188 (track dynamited); United States v. Powell (D. C. E. D. Ky. 1922), *The Federal Antitrust Laws* (1938) 194 (freight cars loaded with coal set on fire). Contra: United States v. Hency (D. C. N. D. Tex. 1923) 286 Fed. 165 (quicksilver put in boiler of engine which was not then attached to train).

24. United States v. Taliaferro (D. C. W. D. Va. 1922) 290 Fed. 214, 220 (Barber found guilty of contempt for violating injunction by placing in shop window a sign reading "No scabs wanted here."): "It is contended that this court had authority to enjoin only acts which restrained interstate commerce * * * it seems to me that the act of molesting, annoying and insulting numbers of those who are working for, or are desirous of working for, an interstate carrier, during a wide spread strike, has an all-sufficient tendency to restrict interstate transportation * * * to fully justify an injunction." Aff'd Taliaferro v. United States (C. C. A. 4, 1923) 290 Fed. 906.

25. In re Debs (1895) 158 U. S. 564, involved the question of interference with transportation but the court did not rely on the Sherman Act.

26. Apex Hosiery Co. v. Leader (1940) 310 U. S. 469. Accord: United States v. Hency (D. C. N. D. Tex. 1923) 286 Fed. 165, 171: "The Sherman Law punishes those who combine in restraint of trade and not for sabotage."

27. See notes 22 and 23, supra. Cf. United Mine Workers v. Coronado Coal Co. (1922) 259 U. S. 344 (murder and arson); Apex Hosiery Co. v. Leader (1940) 310 U. S. 469 (destruction of property during sit-down strike).

28. There has been considerable confusion arising out of the use of the term "secondary boycott." For criticisms see Frankfurter and Greene, The

strike" has been held sufficient to evince the required intent to restrain commerce. Agreements, arising from union rules or from contracts with employers, directed toward stabilizing employment conditions by such means as prohibiting members from working on non-union products²⁹ or with non-union laborers,³⁰ or from buying non-union products³¹ have, with a few notable exceptions,³² been found illegal.

Uncertainties of the law,³³ gross misinterpretations of the Clayton Act,³⁴ the inequalities of the rules applied to industrial

Use of Injunctions in American Labor Controversies (1928) 44 L. Q. Rev. 164, 195; Witte, *The Government in Labor Disputes* (1932) 38. For a discussion of the identical effect upon interstate commerce of a strike at point of production and boycott at point of destination see Gregory, *The Sherman Act v. Labor* (1941) 8 U. of Chi. L. Rev. 222.

29. Duplex Printing Press Co. v. Deering (1921) 254 U. S. 443; Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n (1927) 274 U. S. 37; United States v. Brims (1926) 272 U. S. 549; Boyle v. United States (C. C. A. 7, 1919) 259 Fed. 803; Columbus Heating & Vent. Co. v. Pittsburgh Bldg. Trades Council (D. C. W. D. Pa. 1927) 17 F. (2d) 806; Decorative Stone Co. v. Building Trades Council (D. C. S. D. N. Y. 1927) 18 F. (2d) 333. Contra: United States v. Gold (C. C. A. 2, 1940) 115 F. (2d) 236.

30. Aeolian Co. v. Fischer (C. C. A. 2, 1930) 40 F. (2d) 189.

31. Loewe v. Lawlor (1908) 208 U. S. 274; Fehr Baking Co. v. Bakers' Union (D. C. W. D. La. 1937) 20 F. Supp. 691.

32. National Ass'n of Window Glass Manufacturers v. United States (1923) 263 U. S. 403. A constitutional provision of the Painters, Decorators, and Paperhangers of America provides that if a local contractor employing union men, engages in work outside of the locality covered by the agreement he must pay the higher of either the prevailing wage in the locality in which the job is to be done or the prevailing wage in the locality covered by the agreement. Wage agreements incorporating this provision have been held not to violate the anti-trust laws: Barker Painting Co. v. Brotherhood of Painters (C. C. A. 3, 1926) 15 F. (2d) 16; Barker Painting Co. v. Brotherhood of Painters (App. D. C. 1927) 23 F. (2d) 743; Ram-busch Decorating Co. v. Brotherhood of Painters (C. C. A. 2, 1939) 105 F. (2d) 134. Contra: J. I. Hass, Inc. v. Local Union No. 17 (D. C. Conn. 1924) 300 Fed. 894.

33. "Another test of the uncertainty attendant upon the cases under the act is the extent to which the district courts, the circuit courts of appeals, and the Supreme Court have disagreed with each other in interpreting the law. In six cases the circuit courts of appeals reversed the judgments of district courts. Eight times the Supreme Court reversed the decisions of the courts below. This last is especially significant in view of the fact that there have only been ten decisions rendered by the Supreme Court in labor cases under the statute." Berman, *Labor and the Sherman Act* (1930) 225.

34. Amidon, J., in *Great Northern Ry. v. Brosseau* (D. C. D. N. D. 1923) 286 Fed. 414, 420: "Notwithstanding the legislative history of the statute, and its highly remedial character, as indicated by its history and the reports of the committees having it in charge, many lower federal courts have studiously striven to disregard its plain language, as well as the actual intent of Congress, as disclosed by the history of the statute. Some have held that all strikes cause irreparable injury, and therefore the employer is entitled to an injunction to prevent such injury. Other courts have gone

combinations compared with those applied to labor combinations,³⁵ and the dramatic situations portrayed in the *Duplex*³⁶ and the *Bedford*³⁷ cases, led to growing demands on the part of labor and the public that Congress once again curtail judicial interpretation of the anti-trust laws. The result was the Norris-LaGuardia Act which, in unequivocal language, withdraws from the federal courts the power to issue injunctions against specified labor activities arising out of a labor dispute³⁸ unless these activities are accompanied by violence or fraud,³⁹ and even then a designated procedure must be followed.⁴⁰ Early interpretation of the Norris-LaGuardia Act regarded it as a procedural withdrawal of the power of the federal courts to issue injunctions

so far as to hold that the entire statute was a trick by Congress to so frame the measure that one part of it would nullify the other. Other courts have said there was no such thing as peaceful picketing, and hence no such thing as peaceful persuasion, and therefore the plain language of the statute must be disregarded by the court, and all picketing and all attempts by strikers to exercise their rights of peaceful persuasion were to be restrained, and injunctions have accordingly issued. Other courts, notwithstanding the specific language of the last clause of section 20 that the doing of the acts which it permits should not be held to be in conflict with any federal law, have restrained strikes upon the ground that they violated the Sherman Anti-Trust Law and statutes forbidding the obstruction of the United States mails.

"In my judgment, all such action by courts is a gross abuse of judicial power, and a direct refusal on their part to obey a statute which was intended to limit their powers. It may be that the statute is economically and socially unwise, because of the vast injuries which strikes inflict upon society. Those considerations, however, are for Congress and not for the courts."

35. 1 Teller, *Labor Disputes and Collective Bargaining* (1940) 563, sec. 190; Frey, *The Double Standard in Applying the Sherman Act* (1928) 18 Am. Lab. Leg. Rev. 302. "The Sherman Law was held in *United States v. United Shoe Machinery Co.*, 247 U. S. 32, to permit capitalists to combine in * * * [one] corporation practically the whole shoe machine industry of the country, necessarily giving it a position of dominance over shoe-manufacturing in America. It would indeed, be strange if Congress had by the same Act willed to deny to members of a small craft of workmen the right to cooperate in simply refraining from work, when that course was the only means of self-protection against a combination of militant and powerful employers. I cannot believe that Congress did so." Brandeis, J., dissenting in *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n* (1927) 274 U. S. 37, 65.

36. *Duplex Printing Press Co. v. Deering* (1921) 254 U. S. 443.

37. *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n* (1927) 274 U. S. 37.

38. Norris-LaGuardia Act (1932) 47 Stat. 70, c. 90, sec. 1, 29 U. S. C. A. (Supp. 1940) sec. 101. "Labor dispute" is defined: Norris-LaGuardia Act (1932) 47 Stat. 73, c. 90, sec. 13, 29 U. S. C. A. (Supp. 1940) sec. 113.

39. Norris-LaGuardia Act (1932) 47 Stat. 70, c. 90, sec. 4, 29 U. S. C. A. (Supp. 1940) sec. 104.

40. Norris-LaGuardia Act (1932) 47 Stat. 71, 72, c. 90, secs. 7, 8, 29 U. S. C. A. (Supp. 1940) 107, 108.

and not as an alteration of the substantive law. Thus, actions against labor unions continued on the non-injunctive front. The Anti-Trust Division of the Department of Justice commenced a drive to eliminate certain labor union activities which that Division felt to have a restraining effect on interstate commerce.⁴¹ It was out of this drive that the instant case arose. At the same time, the Supreme Court had before it the *Apex* case,⁴² which was a suit for treble damages arising out of a sit-down strike, which was accompanied with violence and a refusal by the union to allow the manufacturer to ship \$800,000 worth of finished hosiery, 80 per cent of which was destined to meet unfilled orders in points out of the state. There the court, with Procrustean determination, fitted a new doctrine over its own past interpretations of the anti-trust laws, and found that those activities did not constitute a conspiracy in restraint of trade and commerce. The test which the court enunciated was that in order for the activities of a labor union to constitute a "direct" restraint there must be a "showing of some form of market control of a commodity, such as to monopolize the supply, control its price, or discriminate between its would-be purchasers."⁴³ But

41. In a letter written to the secretary of the Central Labor Union of Indianapolis, Mr. Arnold set forth the Justice Department's policy in union cases under the anti-trust laws:

"The types of unreasonable restraints against which we have recently proceeded or are now proceeding illustrate concretely the practices which in our opinion are unquestionable violations of the Sherman Act, supported by no responsible judicial authority whatever.

"1. Unreasonable restraints designed to prevent the use of cheaper material, improved equipment, or more efficient methods.

"2. Unreasonable restraints designed to compel the hiring of useless and unnecessary labor.

"3. Unreasonable restraints designed to enforce systems of graft and extortion.

"4. Unreasonable restraints designed to enforce illegally fixed prices.

"5. Unreasonable restraints designed to destroy an established and legitimate system of collective bargaining." (1939) 5 Labor Relations Rep. 316. For a penetrating analysis of this letter see 8 I. J. A. Bull. 53.

42. *Apex Hosiery Co. v. Leader* (1940) 310 U. S. 469. The literature on this case is already voluminous: Brown, *The Apex Case and Its Effect Upon Labor Activities and the Anti-Trust Laws* (1941) 21 Boston U. L. Rev. 48; Gregory, *The Sherman Act v. Labor* (1941) 8 U. of Chi. L. Rev. 222; Cavers, *Labor v. Sherman Act* (1941) 8 U. of Chi. L. Rev. 246; Landis, *The Apex Case* (1941) 26 Cornell L. Q. 191; Steffen, *Labor Activities in Restraint of Trade: The Apex Case* (1941) 50 Yale L. J. 787; Note (1940) 8 I. J. A. Bull. 125.

43. This test has been criticized on the ground that it would permit the large manufacturer and producer to invoke the Sherman Act by reason of the large proportion of production which they control, while it would give the small producer no protection. See Steffen, *Labor Activities in Restraint of Trade: The Apex Case* (1941) 50 Yale L. J. 787, 820; Cavers, *Labor v. The Sherman Act* (1941) 8 U. of Chi. L. Rev. 246, 254; Gregory, *The Sherman Act v. Labor* (1941) 8 U. of Chi. L. Rev. 222, 236.

this test also permits a price increase if that increase results from the elimination of price competition based on differences in labor standards.⁴⁴

STATUTORY CONSTRUCTION

Perhaps the most striking feature of Mr. Justice Frankfurter's opinion in the *Hutcheson* case is the judicial process which he used to arrive at his conclusion. The essence of this process is that without the restriction placed by the *Duplex* case upon section 20 of the Clayton Act,⁴⁵ the activities of the defendants in the instant case would not be subject to an injunction. Congress, in passing the Norris-LaGuardia Act, rendered a legislative disapproval of this judicial interpretation of section 20 and placed its own meaning on that section.⁴⁶

But to argue * * * that the *Duplex* case still governs for purposes of a criminal prosecution is to say that that which on the equity side of the court is allowable conduct may in a criminal proceeding become the road to prison.⁴⁷ * * *

44. Labor standards include more than mere wage differentiation; there are increased costs to the employer in providing sanitary conditions, reducing hours, abolishing speed-up systems, etc.

45. "It had, unfortunately, not been sufficiently noticed by commentators that prior understanding of the *Duplex* and *Bedford* restrictions upon Section 20 privileges had, *sub silentio*, undergone sharp revision. For one thing, the *Tri-City* case, decided in the very term of the *Duplex* decision, granted the privileges of Section 20 not only to actual strikers but also to members of the defendant unions who were neither former nor prospective employees of the complaining employer. * * * Again, the right to picket and publicise have lately been held to be 'within that liberty of communication which is secured to every person' by the Constitution [*Thornhill v. Alabama* (1940) 310 U. S. 88]. Finally, the opinion of Mr. Justice Stone in the *Apex* * * * case served notice that because of the Norris-LaGuardia Act the door was open for reconsideration of the scope of the privileges defined in Section 20 of the Clayton Act." Note, *Labor Under the Hutcheson Decision* (1941) 9 I. J. A. Bull. 85, 94.

46. H. R. Rep. No. 669, 72d Cong., 1st Sess. 3. Mr. Justice Frankfurter is extraordinarily equipped to give the intent on this matter, he collaborated in drafting the Norris-LaGuardia Act, S. Rep. No. 163, 72d Cong. 1st Sess. See, Note (1941) 9 I. J. A. Bull. 85, 95.

47. For a criticism of this statement see Landis, *The Apex Case*, Addendum (1941) 26 Cornell L. Q. 191, 212C: "Traditionally, however, equity does not normally determine whether conduct is 'allowable' or not; it determines whether under the circumstances its extraordinary powers shall be exercised to grant relief of the nature requested or whether the parties shall be left to such remedies as they possess upon the law side of the court. And the 'law side' may in innumerable cases treat as criminal that for which injunctive relief is denied. This, moreover, was the great issue underlying the battle over government by injunction in labor disputes, namely that procedurally injunctive relief was unfairly administered to labor in this class of cases and that, therefore, the injunctive mode of relief should be curtailed and complaining parties left to whatever remedies, legal or criminal, might otherwise be available."

That is not the way to read the will of Congress, particularly when expressed by a statute which * * * is practically and historically one of a series of enactments touching one of the most sensitive national problems. Such legislation must not be read in a spirit of mutilating narrowness.⁴⁸

Thus the court adopted the position that the Norris-LaGuardia Act restored the broad purpose of the Clayton Act, and that it removed from the specified activities enumerated in section 20 the taint of being a violation of any law of the United States.⁴⁹

The effect of this reasoning is that the Court must overrule the *Duplex* and the *Bedford* decisions (both injunction cases) because Congress did so; and with the demise of these decisions must go their interpretation of the Clayton Act. Thus the Court must now reconsider the Clayton Act as interpreted by Congress and without the "shreds of a discarded judicial interpretation still clinging to it and narrowing its scope."⁵⁰

This method of judicial construction is a healthy recognition of the fact that it is the job of the legislature to determine governmental policy and that it is the job of the courts to recognize the spirit of that policy as long as it is not actually inconsistent

48. *United States v. Hutcheson* (1941) 61 S. Ct. 463, 469.

49. Criticism has been leveled at making the application of the Sherman Act hinge upon the scope of "labor dispute" as defined in the Norris-LaGuardia Act. The contention is that the Norris-LaGuardia Act allows injunctions where there is not a "labor dispute" (*United States v. Brims* (1926) 272 U. S. 549, is cited as an example). And even where there is a "labor dispute" the Act permits injunctions if there is violence or fraud; thus "sporadic 'illegal means' of a few individuals may make criminal otherwise lawful activity." (*O'Brien v. United States* (C. C. A. 6, 1923) 290 Fed. 185, and *United States v. Norris* (D. C. N. D. Ill. 1918) 255 Fed. 423, are cited as examples.) Landis, *The Apex Case*, Addendum (1941) 26 Cornell L. Q. 191, 212E. This contention is not as valid as might appear at first glance. There is no guarantee that the *Brims* case would not be considered a labor dispute if it were now presented to the court for decision, Gregory, *The New Sherman-Clayton-Norris-LaGuardia Act* (1941) 8 U. of Chi. L. Rev. 503, 515. Concerning the violence and fraud cases, the Norris-LaGuardia Act (1932) 47 Stat. 71, c. 90, sec. 6, 29 U. S. C. A. (Supp. 1940) 106, provides that no organization or officer or member of an organization is responsible for unlawful acts by individuals unless there is actual authorization or ratification. Also see *Terrio v. S. N. Nielsen Const. Co.* (D. C. E. D. La. 1939) 30 F. Supp. 77, 79: "The assault by Manny Moore is an individual act, not chargeable to any of the defendants. Even if it were chargeable to the defendants, it would not be an act in furtherance of restraint of trade. It would constitute an unlawful act under the criminal laws against committing assaults." Moreover, the *Hutcheson* case does not reject the test of substantial market control laid down in *Apex Hosiery Co. v. Leader* (1940) 310 U. S. 469, where there was violence. This would seem to indicate that the Norris-LaGuardia Act does not exhaust immunity from the Sherman Act.

50. Mr. Justice Cardozo, in *Van Beeck v. Sabine Towing Co., Inc.* (1937) 300 U. S. 342, 344.

with constitutional provisions. The extent to which the courts have, by narrow interpretation, throttled and made ineffective many legislative attempts to adjust our political structure to the realities of our complex economic and social life has been pointed out many times.⁵¹ Mr. Justice Frankfurter has himself applied to the judicial interpretation of the anti-trust laws the French cynicism, "the more things are legislatively changed, the more they remain the same judicially".⁵² But the process of judicial construction found in the *Hutcheson* case is not new to the anti-trust laws. In the *First Coronado* case,⁵³ Mr. Chief Justice Taft, by recognizing the considerable amount of legislation granting labor unions status before the law, abandoned the common law principle that such unincorporated associations were not suable entities and found that there was a legislative intent to give such organizations legal liabilities and privileges and decided that they could therefore be sued. There has been a noticeable tendency recently to recognize, by this method, the "equity of the statute"⁵⁴ in non-labor cases.⁵⁵

To those who fear the possible consequences of the judiciary's allowing full expression to the spirit of legislative policy, four assurances might be given: First, the necessity for the application of this doctrine is limited. Second, although the doctrine may lead conceivably to some dangerous situations, it cannot be escaped,

because times, relations, things change, and cannot be foreseen by human intellect; nor is it given to any man to provide for all cases already existing, or to use language which

51. Cohen, *Law and the Social Order* (1933) 112; Fraenkel, *Judicial Interpretation of Labor Laws* (1939) 6 U. of Chi. L. Rev. 577.

52. Frankfurter and Greene, *The Labor Injunction* (1930) 176.

53. *United Mine Workers v. Coronado Coal Co.* (1922) 259 U. S. 344, 385-392. Compare *United States v. Corrozzo* (D. C. N. D. Ill. 1941) 3 C. C. H. Labor Law Serv. par. 60,282, in which Judge Sullivan follows the same reasoning found in the instant case. This case was decided three days before *United States v. Hutcheson*.

54. For an excellent treatment of the history and use of this doctrine, see Landis, *Statutes and the Sources of Law*, *Harvard Legal Essays* (1934) 213.

55. *Van Beeck v. Sabine Towing Co., Inc.* (1937) 300 U. S. 342 (statutory cause of action in favor of personal representative of deceased seaman did not abate on death of sole beneficiary); *Keifer and Keifer v. Reconstruction Finance Corp.* (1939) 306 U. S. 381 (Although no authority was specifically given, the Regional Agricultural Credit Corporation has authority to sue and be sued because Congress has manifested an attitude by uniformly granting amenability to law of such corporations); *Federal Housing Admin. v. Burr* (1940) 309 U. S. 242 (F. H. A. subject to garnishment); *Johnson v. United States* (C. C. A. 1, 1908) 163 Fed. 30 (bankrupt's schedules are in the nature of pleadings).

shall leave no doubt. Many things are dangerous, yet we cannot dispense with them nevertheless.⁵⁶

Third, such a procedure at its worst can be no more pernicious than the full sway of judge-made law. Fourth, the electorate has recourse through the legislature to reject any excesses in which the judiciary might engage. The judiciary will be sensitive to the will of the legislature by the very definition of the doctrine.

EFFECT OF DECISION

The decision in the *Hutcheson* case does not exempt labor unions entirely from prosecution under the anti-trust laws. Mr. Justice Frankfurter said:

So long as a union acts in its self-interest and does not combine with non-labor groups [*United States v. Brims* is cited in a footnote as an example] the licit and the illicit under Sec. 20 are not to be distinguished from any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.⁵⁷

This sentence, with its accompanying footnote,⁵⁸ will lead to much debate and to no little litigation. Mr. Justice Frankfurter really introduced the question of the extent to which a union or a group of unions may mutually cooperate and agree with an employer or an association of employers to stabilize employment conditions in any particular industry. Not all commerce-restraining agreements between employers and unions are illegal *per se*.⁵⁹ What agreements are legal? The answer cannot be found readily or immediately, but some possible situations can be considered. Agreements between employers and unions can be classified into three groups.

56. Lieber, *Legal and Political Hermeneutics* (3d ed. 1880) 53.

57. *United States v. Hutcheson* (1941) 61 S. Ct. 463, 466.

58. *United States v. Brims* (1926) 272 U. S. 549. Union millwork manufacturers in Chicago, because of the difference between union and non-union labor standards, were being undersold by non-union manufacturers located in other states. As a result, Chicago manufacturers had to reduce operations. In order to maintain employment and union standards, the union made an agreement with the manufacturers whereby the employers would employ only union carpenters and the union members would work only on union-made millwork. The case has been criticised for not applying the rule of reason: Berman, *Labor and the Sherman Act* (1930) 164. Such agreements are not uncommon in collective bargaining contracts, Lieberman, *The Collective Labor Agreement* (1939) 185-187.

59. *National Ass'n of Window Glass Manufacturers v. United States* (1923) 263 U. S. 403. One may wonder why Mr. Justice Frankfurter did not cite this case along with the *Brims* case.

1. *Agreements which have as their purpose the elimination of cost differences arising out of the variance between union and non-union working conditions.*

The federal courts have recognized, either directly or by applying the "labor dispute" concept, that the continued existence of unions is dependent upon their ability to raise and maintain standards of working conditions, and that this ability depends to a considerable extent upon the elimination of non-union⁶⁰ or extra-union⁶¹ competition. The methods to which unions may resort in order to eliminate such competition are limited. They may endeavor to organize the non-union employees by direct organizational activity and by creating local pressure through picketing and publicity to force the employer to bargain with a union. If, for various reasons, a union cannot prosecute an organizational campaign successfully at the point of produc-

60. *American Steel Foundries v. Tri-City Central Trades Council* (1921) 257 U. S. 184; *Apex Hosiery Co. v. Leader* (1940) 310 U. S. 469, 503: "Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, * * * an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act." Also *United States v. Gold* (C. C. A. 2, 1940) 115 F. (2d) 236. Contra: *Alco-Zander Co. v. Amalgam. Clothing Workers* (D. C. E. D. Pa. 1929) 35 F. (2d) 203 (Union enjoined from pursuing campaign to organize non-union plants in Philadelphia in order to protect wage scale of union plants in New York).

See Restatement, *Torts* (1939) sec. 803: "Employees who strike against an employer who uses in his business goods or services produced by, or furnishes goods or services to or on behalf of, a third person whose employees are engaged in a labor dispute with him for a proper object or are not members of a labor union satisfactory to the actors are not liable to the employer or to the third person if the actors have a substantial interest in the third person's employment relations."

61. *Milk Wagon Drivers' Union v. Lake Valley Farm Products* (1940) 311 U. S. 91; *Fur Workers' Union, Local No. 72 v. Fur Workers' Union* (App. D. C. 1939) 105 F. (2d) 1, aff'd *per curiam* (1940) 208 U. S. 522; *Blankenship v. Kurfman* (C. C. A. 7, 1938) 96 F. (2d) 450; *Lund v. Woodenware Workers' Union* (D. C. D. Minn. 1937) 19 F. Supp. 607; *Terrio v. S. N. Nielsen Const. Co.* (D. C. E. D. La. 1939) 30 F. Supp. 77. The American Law Institute takes the position that "Jurisdictional disputes as to whether particular work be done by one craft rather than another" should be no more illegal than other labor activities directed towards the "Maintenance or change of terms of employment relating to hours, wages, working conditions or other perquisites or duties of employees * * *." Restatement, *Torts* (1939) sec. 784, comment d. Contra: *Union Premier Food Stores v. Retail Food C. and M. Union* (C. C. A. 3, 1938) 98 F. (2d) 821; *Oberman & Co. v. United Garment Workers* (D. C. W. D. Mo. 1937) 21 F. Supp. 20; *Consolidated Term. Corp. v. Drivers, C. and H. Local* (D. C. D. C. 1940) 33 F. Supp. 645; *United States v. Drivers, C. and H. Local* (D. C. D. C. 1940) 32 F. Supp. 594. See Jaffe, *Inter-Union Disputes in Search of a Forum* (1940) 49 Yale L. J. 424.

tion, it may resort to activities at the point of destination or consumption and occasionally while goods are in transit. This may lead to a reduction in the non-union employer's market and thus tend to force him to unionize in order to have a market for his products. Notwithstanding a substantial body of judicial decisions that such activities interfering with products in transit or at the point of destination violate the Sherman Act,⁶² these decisions must now be reconsidered in the light of the Norris-LaGuardia Act and the *Hutcheson* case. The federal courts, following Congressional definition, have given a broad meaning to the term "labor dispute."⁶³ Applying the construction followed in the instant case, these activities, which are not enjoined under the Norris-LaGuardia Act, are not violative of any law of the United States. Now if union workmen can and do refuse to work on non-union or extra-union material or with non-union workmen, what provision should be made for such a refusal in a collective bargaining contract with an employer or an association of employers? The employer, desiring to secure every possible guarantee that there be no interruption of work due to strikes, would probably seek a no-strike clause. The union, seeing that such a clause would prevent striking in the event that the employer should utilize non-union products or employ non-union workmen, would make a counter-offer that the employer operate a union or closed shop and refuse to handle non-union products. Although such a counter-offer, should it become a part of the contract, would restrain interstate commerce and would increase prices by eliminating non-union standards, reason indicates that it would not violate the anti-trust laws.

If an employer is hesitant about signing a contract with a

62. See notes 29, 30, and 31, *supra*.

63. *New Negro Alliance v. Sanitary Grocery Co.* (1938) 303 U. S. 552 (picketing against employer who secured practically all his patronage from negroes but refused to employ negroes); *Lauf v. Shinner and Co.* (1938) 303 U. S. 323 (picketing in absence of a strike); *Milk Wagon Drivers' Union v. Lake Valley Farm Products* (1940) 311 U. S. 91 (picketing, allegedly in violation of Sherman Act, retail stores which purchased milk pursuant to the "vendor system" operated by plaintiff dairies under contract with another union); *Wilson and Co. v. Birl* (C. C. A. 3, 1939) 105 F. (2d) 948 (mass picketing with misleading banners to obtain a closed shop agreement); *Levering & Garrigues Co. v. Morrin* (C. C. A. 2, 1934) 71 F. (2d) 284 (threatening to strike if owners or contractors let sub-contracts to members of a trade association which operated on an open-shop basis); *Diamond Full Fashioned Hosiery Co. v. Leader* (D. C. E. D. Pa. 1937) 20 F. Supp. 467 (picketing closed plant to secure employment); *Green v. Obergfell* (App. D. C. 1941) 8 Labor Relations Rep. 141 (brewery workers' union refused injunction to restrain teamsters' union and A. F. of L. from carrying out decision of A. F. of L. that drivers in brewery industry come under jurisdiction of teamsters' union). See note 61, *supra*.

union because he fears that he cannot compete with non-union products selling at a lower price, can the union assure him, either orally or in a contract, that it too is concerned about such competition and that its members are not going to work on non-union material or with non-union workmen? Provided that the union does not refuse absolutely to bargain with the employer unless he does join the trade association, can the union suggest that the employer join such an organization and participate in a joint contract negotiated by the union and the trade association? Of if a group of employers claim that individually they cannot establish or maintain the union scale, although they are otherwise willing to recognize the union, can the union suggest that by forming an association for the purpose of negotiating jointly and enforcing a single contract, employers can reduce the cost of unionizing and enjoy the additional advantage of assurance that there will be no resultant underselling from the differences in union and non-union scales, at least to the extent of the membership in their trade association?⁶⁴ Close scrutiny reveals that none of the above procedures would result in any degree of market control over commodities, except for price differentiation that might result from the difference between union and non-union standards, and that none of them involve the use of any forbidden activities, and that therefore none of them would be violative of the anti-trust laws.

2. Agreements which have as their purpose the stabilizing of employment.

These agreements will arise primarily if there are technological developments which disrupt existing working conditions, or if economic booms and depressions create problems of job adjustment. In *United States v. National Association of Window Glass Manufacturers*,⁶⁵ the Supreme Court had before it a case which falls into this classification. The hand-blown window glass industry had been, for a quarter of a century, a dying industry because of the development of machine made glass, costing only half as much to produce and selling at the same price. During this period, the labor supply seriously diminished because new workmen were not willing to undergo the required years of apprenticeship in order to attain a skill with such a doubtful future.

64. Cf. Restatement, *Torts* (1939) sec. 793: "An employer's consenting to become, remain or cease to be a member of an association of employers is not a proper object of concerted action by workers when they do not reasonably believe that his membership or non-membership in the association will aid a collective interest of the workers."

65. (1923) 263 U. S. 403.

Consequently, there was not a sufficient number of workmen to operate fully the various factories during the working season, and operation without a complete force of workmen would result in serious loss to employers. To stabilize employment and to enable the various factories to operate on the most efficient basis, the manufacturers and the union entered into an agreement whereby the available labor supply was apportioned to a part of the plants for a portion of the working season, and to the remainder of the plants for the rest of the season. The Supreme Court, realizing the economic conditions of the industry and the social advantage of stabilized employment gained by the agreement, held that this was not an unreasonable restraint of trade. Although the agreement in this case prolonged the life of an industry which did not have the power to affect prices, the test of "reasonableness" applied here should be used in all cases involving attempts to reduce the shock of changing employment conditions. Unions have an interest in the introduction of improved equipment and more efficient methods in an industry, not only from the negative viewpoint of the losses that members will suffer by such introductions, but also from the positive viewpoint of the workmen's share in the gains to be derived from improved methods.⁶⁶ Changes of equipment and methods are a proper subject for collective bargaining, and any agreement incorporating such adjustments in it should be measured by its "reasonableness," the court taking into consideration the economic benefits of continued employment, the economic appropriateness of the introduction of new devices, and the social obligation of industry as a whole to society.

3. *Agreements which have as their purpose the establishment of monopolistic practices.*

(a) Where an employer or an association of employers initiates monopolistic practices.

An association of employers and a union may agree that the union members will not work on non-union products and that members of the association will operate on a closed shop basis. The union may only intend to affect the labor cost factor, but the association may go further, taking advantage of the union's boycott of non-union products, and engage in price fixing, collusive bidding, *et cetera*.⁶⁷ Or, a union may agree to bargain only with

66. Lieberman, *The Collective Labor Agreement* (1939) 134, 146; Note, *The Folk-Law of Thurman Arnold* (1939) 8 I. J. A. Bull. 53, 63.

67. See *United States v. International Fur Workers' Union* (C. C. A. 2, 1938) 100 F. (2d) 541, cert. denied (1938) 306 U. S. 653. In this case, however, there was evidence of the union's complicity in the conspiracy to engage in monopolistic practices.

employers who are members of an association and to exert economic pressure upon non-member employers by boycotting their products. If non-member employers will not be admitted to the association, or will be admitted only upon conditions that violate the anti-trust laws or upon conditions which the union does not reasonably believe will benefit a collective interest of the union's members, the labor union becomes a strong arm of the trade association.⁶⁸ If the alleged illegal activities are initiated by employers and the union gains only such benefits as are reasonable incidents of collective bargaining agreements, the legality of such combinations should be tested by their "reasonableness" in an action brought against the employers.

(b) Where a union or a council of unions initiates monopolistic practices.

Under the guise of unionism, a group of employees or leaders of a group of employees may foster racketeering activities to extort money or advantages which are not reasonable incidents of collective bargaining agreements. Persons who participate in such activities should certainly be prosecuted—but not under the anti-trust laws. There are adequate laws under which such activities can be prosecuted,⁶⁹ and these laws, not the anti-trust laws, should be utilized.

The above classification is by no means exhaustive; it is intended only to suggest some of the necessary considerations for determining whether a combination entered into by employers and unions comes within the pale of anti-trust law prohibitions. A number of combinations have been condemned by the federal courts,⁷⁰ but the use of these cases as precedents is of dubious

68. *Local 167 v. United States* (1934) 291 U. S. 293. It has been held that there is not a "labor dispute" within the meaning of the Norris-LaGuardia Act where a union engages in activities to fix prices, *Scavenger Service Corp. v. Courtney* (C. C. A. 7, 1936) 85 F. (2d) 825, or to enforce collusive bidding, *Converse v. Highway Const. Co.* (C. C. A. 6, 1939) 107 F. (2d) 127.

69. Anti-Racketeering Act (1934) 48 Stat. 979, 18 U. S. C. A. (Supp. 1940) secs. 420a-420e. See Arnold, *The Bottlenecks of Business* (1940) 248: "There may be assault, murder, trespass and anything else. But the Sherman Act is not designed to take the place of state and municipal government. It must not be used as a vortex into which are whirled all forms of law enforcement. Both as theoretical and as a practical matter, local policing of violence, trespass, appropriation of property, etc., should be left to local police."

70. In *Local 167 v. United States* (1934) 291 U. S. 293, poultry marketmen organized a Chamber of Commerce to increase prices and allocate retailers. Members of Local 167 agreed not to handle poultry for recalcitrant marketmen, and members of Shoctim agreed to refuse to slaughter. The Chamber of Commerce hired men to spy upon and to prevent by acts of violence dealers from not conforming. In *United States v. Painters Dist.*

value now. Some of them were decided under the interpretation given to the Clayton Act by the *Duplex* case.⁷¹ They should now be reconsidered in the light of the market control test of the *Apex* case, the rule of construction found in the instant case, and the national policy, expressed in the National Labor Relations Act, favoring collective bargaining.

Instead of taking his cue from the rule of construction found in the *Hutcheson* case, Mr. Thurman Arnold is now adopting the mantle which the court has cast aside. The Anti-Trust Division has dismissed only one case since the *Hutcheson* decision. In announcing the dismissal of this case, Mr. Arnold said:⁷²

It is difficult to see any economic justification for this result [losses occurring to an employer from a jurisdictional dispute].⁷³ Nevertheless as we read the case of *United States*

Council No. 14 (D. C. N. D. Ill. 1930) 44 F. (2d) 58, aff'd *per curiam* (1931) 284 U. S. 582, the painters' union refused to work on finished fixtures, kitchen cabinets and woodwork. In *Boyle v. United States* (C. C. A. 7, 1919) 259 Fed. 803, switchboard manufacturers agreed to unionize and union agreed to boycott and strike on jobs using non-union material. In *Belfi v. United States* (C. C. A. 3, 1919) 259 Fed. 822, there was a written contract that tile dealers' association would employ only union workmen and that members of tile setters' union would give preference to requests made by members of association over those made by non-association dealers. There was evidence that in addition there was an oral agreement that union members would not work for non-association dealers. *Decorative Stone Co. v. Building Trades Council* (D. C. S. D. N. Y. 1927) 18 F. (2d) 333 (union refused to work on non-union made artificial stone, which refusal the employers actively supported); *United States v. International Fur Workers' Union* (C. C. A. 2, 1938) 100 F. (2d) 541 (in order to maintain wage standards, union urged the formation of and agreed to cooperate with a trade association, trade association then engaged in price fixing and "quota" allocating); *Borderland Coal Corp. v. United Mine Workers* (D. C. Ind. 1921) 275 Fed. 871 (union used dues which had been collected by check-off system to finance organizing drive in non-union field); *United States v. Heating, Piping & Air C. Contr. Ass'n* (D. C. S. D. Cal. 1940) 33 F. Supp. 978 (association to operate closed shop, union to work only for members of association); *United States v. Lumber Institute of Allegheny County* (D. C. W. D. Pa. 1940) 35 F. Supp. 191.

71. *Decorative Stone Co. v. Building Trades Council* (D. C. S. D. N. Y. 1927) 18 F. (2d) 333, 336: "Whatever may be said to justify what was done upon grounds of social justice or economic welfare is not open to consideration in this court. Decision is controlled by *Duplex Printing Press Co. v. Deering*." *United States v. Painters' District Council No. 14* (D. C. N. D. Ill. 1930) 44 F. (2d) 58: "The Court is unable to distinguish this situation from the one of *Bedford Cut Stone Co. v. Stone Cutters' Ass'n*." Aff'd *per curiam* (1931) 284 U. S. 582, on authority of *Duplex Printing Press Co. v. Deering* (1921) 254 U. S. 443, *United States v. Brims* (1926) 272 U. S. 549, and *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n* (1927) 274 U. S. 37.

72. *United States v. International Longshoremen's Ass'n* (1941) 9 U. S. L. Week 2485.

73. Mr. Arnold is confusing those activities illegal under the anti-trust laws with those activities which may or may not be economically sound.

v. Hutcheson, the facts alleged in the present indictment are insufficient to charge a violation of the anti-trust laws even though interstate commerce is restrained and the property rights and security of the employers caught between the warring unions are disregarded. We therefore sought dismissal of this case.

We *must accept* the decision of the Supreme Court to the extent to which the Sherman Act may be used to remedy such evils. *This does not mean that we will abandon or fail to prosecute any case which does not fall within the Hutcheson decision.* [Italics supplied.]

What cases do not fall within the *Hutcheson* decision? Mr. Arnold lists six types of labor restraints which he feels are not *expressly* covered by the *Hutcheson* case:⁷⁴

(1) The strike of one union against another union certified by the NLRB to be the only legitimate collective bargaining agency with whom the employer can deal.⁷⁵

(2) Strike to erect a tariff wall around a locality.⁷⁶

(3) The exclusion of efficient methods of pre-fabricated materials from building construction.⁷⁷

(4) The refusal of unions to allow small, independent firms to remain in business.⁷⁸

(5) The activities of unions in imposing and maintaining artificially fixed prices to consumers.⁷⁹

(6) The make work system.⁸⁰

The Anti-Trust Division, through Mr. Arnold, thus expresses determination to bring under the scope of the anti-trust laws every possible labor activity having ends which the Division does

74. 9 U. S. L. Week 2485, which also cites illustrations of these restraints.

75. Does Mr. Arnold mean to indicate that once a contract has been consummated, members of a union, or employees can not engage in peaceful picketing in order to disestablish a union that has proved to be economically unsound in form, or dominated by persons furthering their own interests rather than the employees' interests?

76. Does this mean that unions in an organized community can not boycott non-union material from unorganized communities?

77. Does this mean that there can not be an agreement to adjust to technological change?

78. Does Mr. Arnold mean that he will go so far as to protect the "contracting-out" system which has been a notorious device to prevent unionization and to create sweat shop conditions?

79. Does Mr. Arnold mean that any union activity tending to eliminate price differentiation arising from non-union working standards is illegal?

80. This type is so broad that it could include a union's demand for shorter hours. Does Mr. Arnold propose to remove from the collective bargaining process such questions as the number of men necessary to do a particular job and the rate of an assembly line that can best be maintained from the viewpoint of efficiency and health of employees?

not favor economically. Two comments upon the above classification of "restraints" will be sufficient to indicate that the Anti-Trust Division is endeavoring to negate the effectiveness of the instant decision. First, the generalizations are so vague that they permit prosecution of almost any labor activity.⁸¹ Mr. Arnold, instead of endeavoring to allow expression to the legislative will as has the Supreme Court, now seeks to restrict all activities *not expressly* covered by both the court and the legislature. Second, contrary to the court's statements that objectives sought by the use of particular activities are not to be considered in determining the legality or illegality of a combination in restraint of commerce,⁸² Mr. Arnold condemns the enumerated restraints on grounds of the union's aims.

* * * the test that the Department urged the courts to adopt was this: that the question of whether the privilege of collective bargaining has been illegally used depends upon the objective for which it is used. If that objective is legitimate, then there is no *unreasonable* restraint of trade.⁸³

And conversely, if the objective is illegitimate, by the standards of the Anti-Trust Division (which the court did not adopt in the instant case), then the accompanying peaceful picketing, persuasion or publicising is banned. If this proposed test should be adopted, the guarantees found in the Norris-LaGuardia Act and in the National Labor Relations Act would be entirely circumvented.⁸⁴ Perhaps the greatest support which Mr. Arnold can find in Supreme Court labor decisions is the *dictum* in the instant case in which Mr. Justice Frankfurter indicates that the motives of a union may determine legality if there is a combination with a non-labor group.

81. Not only are these classifications vague, but experience points to the prosecution by the Anti-Trust Division of at least one case inconsistent with Mr. Arnold's declared policy. The Anti-Trust Division, after the letter to the Central Labor Union of Indianapolis on Nov. 20, 1939, continued to prosecute a union for endeavoring to unionize three non-union plants, *United States v. Gold* (C. C. A. 2, 1940) 115 F. (2d) 236. This case cannot be fitted into any of the five categories which were supposedly guiding the Anti-Trust Division in the prosecution of labor unions under the anti-trust laws. See Landis, *The Apex Case* (1941) 26 Cornell L. Q. 191, 211.

82. See *Duplex Printing Press Co. v. Deering* (1921) 254 U. S. 443; *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n* (1927) 274 U. S. 37; *Boyle v. United States* (C. C. A. 7, 1919) 259 Fed. 803; *Consolidated Term. Corp. v. Drivers, C. & H. Local Union 639* (D. C. D. C. 1940) 33 F. Supp. 645; *Blankenship v. Kurfman* (C. C. A. 7, 1938) 90 F. (2d) 450.

83. Arnold, *The Bottlenecks of Business* (1940) 248.

84. Note, *The Folk-Law of Thurman Arnold* (1939) 8 I. J. A. Bull. 53, 61.

Not only is Mr. Arnold endeavoring to avoid legislative policy in the courts by the use of vague classifications and a personally redefined concept of "restraint of commerce"; he apparently desires to give the Federal Trade Commission chancery powers which have been denied the courts.⁸⁵ An indication of what might be the result of such a policy, if it were adopted, is to be found in the Federal Trade Commission's issuance of a cease and desist order against the attempt of Local 383 of the Teamster's Union and seven bakeries to interfere with the distribution of bakery goods by "independent roulemen."⁸⁶ The same sort of situation was found in *Milk Wagon Drivers' Union v. Lake Valley Farm Products*⁸⁷ in which case the Supreme Court held that such practices could not be enjoined under the Norris-LaGuardia Act. Consequently, and by force of the *Hutcheson* decision, such activities on the union's part would not be violative of any law of the United States (including the Federal Trade Commission Act!) unless there existed a combination between the union and a non-labor group. Here, however, the union instigated the agreement as a part of a legitimate collective bargaining contract, which provided that no bakery goods be sold to independent roulemen who were not operating prior to January 1, 1938.

Another circuitous endeavor to escape the effect of the Norris-LaGuardia Act is to be found in some recent cases under the Motor Carrier Act, which prohibits discrimination by a carrier against the goods of any shipper.⁸⁸ If unionized employees of a carrier refuse to handle the goods of a non-union shipper, a refusal permitted by the collective bargaining contract with the carrier, can the non-union shipper secure an injunction against the carrier, requiring it, its agents, and its employees to handle goods offered by the non-union shipper? One decision denied an injunction on the ground that the Motor Carrier Act does not suspend the Norris-LaGuardia Act.⁸⁹ Two other courts, notwithstanding the Norris-LaGuardia Act, issued temporary restraining

85. Mr. Arnold recently recommended to the Temporary National Economic Committee that power should be given to the Federal Trade Commission to act as a master in chancery in anti-trust cases. 9 U. S. L. Week 2486, 2487.

86. *In re Interstate Bakeries Corp.*, F. T. C. No. 3900 (1941) 9 U. S. L. Week 2473.

87. *Milk Wagon Drivers' Union v. Lake Valley Farm Products* (1940) 311 U. S. 91.

88. Motor Carrier Act (1935) 49 Stat. 543, 564, c. 498, 49 U. S. C. A. (Supp. 1940) 322(c). See Flank Attack on Union Contracts (1941) 8 Labor Relations Rep. 4.

89. *Southeastern Motor Lines v. Hoover Trucking Co.* (D. C. N. D. Tenn. 1940) 34 F. Supp. 390.

orders.⁹⁰ Continuation or extension of such indirect attacks upon legitimate activities of labor unions and upon valid collective bargaining contracts is subversion of the legislative policy relative to labor unions, and should be severely condemned.

CONCLUSION

Although the instant decision greatly advances judicial reasoning relative to the questions of labor under the anti-trust laws, with the exception of the *dictum* relative to combinations with non-labor groups, its practical value may be defeated by present defense and war preparation. Labor unions will, either voluntarily or by governmental compulsion, greatly curtail many activities which, under this decision, they would be able to utilize. It is quite probable that the legislature will enact measures which will limit the rights of labor in order to expedite production. The courts will, of course, recognize legislative will in these matters. The permanent effect of these extraordinary conditions upon labor, should normalcy return, is a matter of speculation. But whatever the effect may be, both legislature and judiciary will do well to recognize realistically that emergency legislation is enacted to meet a particular situation. The legislature in drafting any possible enactment and the courts in construing the legislation should keep in mind the occasions giving rise to this legislation—and exigent restrictions upon labor should be confined to these occasions. If this is not done, if either the legislature or the judiciary confuse labor policy necessary to promulgate a program of war preparation with a labor policy desirable in a democracy unshackled by war, the gains made over the last decade of the half century since the enactment of the Sherman Act will go for naught.

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90. *Evans Line, Inc. v. O. K. Trucking Co., Inc.* (D. C. W. Va. 1940) 8 Labor Relations Rep. 4; *Keystone Freight Lines, Inc. v. Pratt Thomas Truck Lines* (D. C. W. D. Okla. 1941) 8 Labor Relations Rep. 19.